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No. 06-11429

IN THE SUPREME COURT OF THE UNITED STATES

KEITH LAVON BURGESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

## QUESTION PRESENTED

Whether a state drug offense that is not classified as a felony under state law, but is punishable by more than one year of imprisonment, is a "felony drug offense" for purposes of the sentencing provisions of 21 U.S.C. 841(b)(1)(A).

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 478 F.3d 658.

## JURISDICTION

The judgment of the court of appeals was entered on March 12, 2007. The petition for a writ of certiorari was filed on May 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the District of South Carolina, petitioner was convicted of

conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846. He was sentenced to 156 months of imprisonment, to be followed by ten years of supervised release. C.A. App. 65-66. The court of appeals affirmed. Pet. App. A1-A7.

1. In October 2002, a Drug Enforcement Agency confidential source (CS) spoke with petitioner about the purchase of some "tint" for petitioner's vehicle, and petitioner asked the CS if he needed any cocaine. Presentence Report (PSR) ¶ 9. The CS asked what the purchase price was for "half a big" -- i.e., 2.25 ounces -- and petitioner replied that he would sell the CS that amount of either powder cocaine or crack cocaine for $1,700. Ibid.

A few days later, the CS met petitioner again. PSR ¶ 10. Petitioner showed the CS that he had four ounces of powder cocaine and four ounces of crack cocaine in the truck of his sister's car, and he told the CS to call him whenever he was ready to make a purchase. Ibid. Petitioner explained that his source of supply was a Jamaican from Miami, Florida, whom petitioner had met in prison. Id. ¶ 11. Petitioner also told the CS that he sold or otherwise distributed more than five kilograms of cocaine and crack cocaine per week. Ibid.

In December 2002, in a controlled, monitored, and recorded call to petitioner's cell phone, the CS inquired about purchasing nine ounces of crack cocaine for $6,500. PSR ¶ 12-13. Petitioner

and the CS made arrangements to meet the following day in the parking lot of a shopping mall in Florence, South Carolina. Id. ¶¶ 13-14. The next day, petitioner and a co-defendant met the CS in the mall parking lot, and then left to go to petitioner's apartment to get the crack cocaine, saying they would return in 20 minutes. Id. ¶ 15. After 45 minutes, the CS called petitioner, and petitioner said they were still "cooking" the cocaine into crack. Id. ¶ 16. About an hour later, petitioner returned to the mall parking lot and consummated the drug deal, providing the CS with two Ziploc bags containing 240.3 grams of cocaine base. Id. ¶¶ 16-17.

2. A federal grand jury returned a two-count indictment charging petitioner and a co-defendant with conspiracy to possess with intent to distribute and to distribute 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1), 841(b)(1)(A), and 846 (Count One), and possession with intent to distribute and distribution of 50 or more grams of cocaine base, in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(A) and 18 U.S.C. 2 (Count Two). C.A. App. 9-12. The government subsequently filed an information pursuant to 21 U.S.C. 851, providing notice of its intent to seek increased punishment because of petitioner's prior conviction for a felony drug offense. C.A. App. 13; see 21 U.S.C. 841(b)(1)(A) (increasing mandatory minimum sentence from ten to 20 years when defendant has previously been convicted of a felony drug offense).

Petitioner previously had been convicted in a South Carolina state court for possession of cocaine, in violation of S.C. Code Ann. § 44-53-370(d)(1). Pet. App. A3. That offense was punishable by up to two years in prison but was categorized as a misdemeanor under state law. Ibid.

Petitioner pleaded guilty to Count One of the indictment. C.A. App. 14-20 (plea agreement). At sentencing, the district court determined that the advisory Sentencing Guidelines range was 151 to 188 months and that petitioner's conviction carried a statutory 20-year mandatory minimum sentence under 21 U.S.C. 841(b)(1)(A) and 846. See id. at 39-40, 45, 47. The court rejected petitioner's argument that, because South Carolina law categorized his prior drug offense as a misdemeanor, his previous state conviction was not a "felony drug offense" for purposes of Section 841(b)(1)(A). The court explained that 21 U.S.C. 802(44) defines a "felony drug offense" as a drug offense punishable by more than one year of imprisonment. See id. at 34-35. Because it was undisputed that petitioner's state drug offense was punishable by up to two years of imprisonment, the court concluded that the enhancement applied. Id. at 32-40. Petitioner argued that the phrase "felony drug offense" is ambiguous because the statute contains a separate definition of "felony" in 21 U.S.C. 802(13), which requires that the offense be "classified by applicable Federal or State law as a felony." The court reasoned, however

that "felony drug offense" is the specific "term of art" used in Section 841(b)(1)(A). C.A. App. 35. The court then granted the government's motion for a downward departure based on substantial assistance and sentenced petitioner to 156 months of imprisonment. Id. at 53-61; Pet. App. A3-A4.

3. The court of appeals affirmed, holding that the district court did not err in applying the 20-year mandatory minimum sentence. The court noted that the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq., defines "felony drug offense" in "plain and unambiguous terms" as "'an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.'" Pet. App. A5 (quoting 21 U.S.C. 802(44)). Adopting the reasoning of the First Circuit in United States v. Roberson, 459 F.3d 39 (2006), cert. denied, 127 S. Ct. 1261 (2007), the court concluded that "[b]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Pet. App. A5 (qucting Roberson, 459 F.3d at 52); see also ibid. (citing Colautti v. Franklin, 439 U.S. 379, 392 n.10 (1979) (a statutory definition "which declares what a term means * * *

excludes any meaning that is not stated" (internal quotation marks omitted))).

The court noted that the CSA separately defines "felony" as "any Federal or State offense classified by applicable Federal or State law as a felony," Pet. App. A3 (quoting 21 U.S.C. 802(13)), but "discern[ed] no basis from the plain language or statutory scheme of the CSA to indicate that Congress intended 'felony drug offense' also to incorporate the definition in 21 U.S.C. 802(13)," id. at A6. The court rejected petitioner's attempt to invoke the rule of lenity, finding that the rule had no application in cases, like this one, where there is "no 'grievous ambiguity or uncertainty' in the pertinent statutes." Ibid. (quoting Muscarello v. United States, 524 U.S. 125, 138-139 (1998)).

ARGUMENT

Petitioner contends (Pet. 5-6) that the court of appeals erred in determining that a state drug offense that is not classified as a felony under state law, but is punishable by more than one year of imprisonment, may qualify as a "felony drug offense" for purposes of the sentencing provisions of 21 U.S.C. 841(b)(1)(A). He argues (Pet. 5) that certiorari is warranted to resolve a conflict between the D.C. Circuit and the First and Fourth Circuits (the only three that have addressed the issue) on this question. The court of appeals' decision is correct, and review is not warranted at this time.

1. The CSA provides that a person who is guilty of possession with intent to distribute 50 grams or more of a mixture or substance containing cocaine "shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life." 21 U.S.C. 841(b)(1)(A). If the defendant "commits such a violation after a prior conviction for a felony drug offense has become final," however, the statute increases the minimum sentence to "not less than 20 years." Ibid. The definitional section of the CSA, 21 U.S.C. 802, defines the phrase "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. 802(44). As the court of appeals correctly held (Pet. App. A6), petitioner's state conviction for cocaine possession is a "felony drug offense," as the phrase is defined in Section 802(44). See S.C. Code Ann. § 44-53-370(d)(1) (cocaine possession punishable by two years in prison, although categorized under state law as a misdemeanor).

Petitioner contends (Pet. 5) that "felony drug offense" as used in Section 841(b)(1)(A) takes its meaning from the provision that specifically defines that phrase, i.e., Section 802(44), but also from a separate provision, Section 802(13), which defines the term "felony" as "any Federal or State offense classified by

applicable Federal or State law as a felony," 21 U.S.C. 802(13). In support of that argument, he invokes (Pet. 6) the rule of lenity. In petitioner's view, the sentencing enhancement in Section 841(b)(1)(A) applies only when a defendant's prior conviction is punishable by more than one year in prison and is classified as a felony by applicable state or federal law. Pet. 5. Petitioner's prior conviction would not qualify as a felony drug offense under that interpretation because applicable state law classifies it as a misdemeanor.

The court of appeals correctly rejected petitioner's argument. The court determined that a crime need not be classified as a felony under state law to be a "felony drug offense" within the meaning of Section 841(b)(1)(A), because although "§ 841 does not define 'felony drug offense,'" "§ 802(44) does so in plain and unambiguous terms." Pet. App. A5. "[B]ecause the term 'felony drug offense' is specifically defined in § 802(44), and § 841(b)(1)(A) makes use of that precise term, the logical, commonsense way to interpret 'felony drug offense' in § 841(b)(1)(A) is by reference to the definition in § 802(44)." Ibid. (quoting Roberson, 459 F.3d at 52); see also Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."). In Section 841(b)(1)(A), "the phrase 'felony drug offense' is a term of art

invoked intentionally by Congress to incorporate by reference the specific definition contained in § 802(44)." Roberson, 459 F.3d at 52; cf. United States v. Cordoza-Estrada, 385 F.3d 56, 58 (1st Cir. 2004) (agreeing with other federal circuits that the statutory definition of the term "aggravated felony" in 8 U.S.C. 1101(a)(43) is a "term of art that includes within its ambit certain misdemeanors under state law that carry a sentence of at least one year").

The court of appeals' conclusion draws support from the statute as a whole. As the First Circuit noted, "the term 'felony' (without the accompanying words 'drug offense') is utilized extensively throughout the CSA for a variety of purposes," Roberson, 459 F.3d at 53, not all of which involve drug offenses. See, e.g., 21 U.S.C. 878(a)(3) (allowing "[a]ny officer or employee of the Drug Enforcement Administration or any State or local law enforcement officer designated by the Attorney General" to make warrantless arrests for "any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony"); see also Roberson, 459 F.3d at 53-54 (collecting statutory provisions). Congress chose to use the more precise term "felony drug offense," in contrast, "solely to specify the type of prior conviction that will trigger a mandatory sentence enhancement." Id. at 53 (citing 21 U.S.C. 841(b)(1), 960(b)). As the First

Circuit explained, "Congress's decision to use the precise term 'felony drug offense' in § 841(b), instead of the more broadly used term 'felony,' evidences an intent to distinguish these sentence enhancement provisions from the other provisions that refer to the generic 'felony.'" Id. at 54. By using the specific phrase "felony drug offense," Congress "avoid[ed] the possibility that the substantial consequences of the mandatory sentence enhancements in § 841(b)(1)(A) would turn on the happenstance of a state's classification of a prior offense." Ibid.

As the First Circuit explained, if Congress had intended the definition in Section 802(44) to include by cross-reference the definition in Section 802(13), it could have so indicated in the text of the statute. Roberson, 459 F.3d at 53. "For example, Congress could have written § 802(44) to state that 'the term 'felony drug offense' means a felony . . . .,'" or it "could have written § 841(b)(1)(A) to trigger a 20-year mandatory minimum whenever any person commits a violation of § 841(a) 'after a prior conviction for a felony drug offense that is classified by applicable Federal or state law as a felony has become final.'" Id. at 52-53. Congress did neither. Because Section 841(b)(1)(A) clearly refers to the definition in Section 802(44), and neither section contains a cross-reference to Section 802(13), there is no "grievous ambiguity" in the statute and no reason to resort to the

rule of lenity. Muscarello v. United States, 524 U.S. 125, 138-139 (1998).

The history of the CSA further supports the court of appeals' interpretation of "felony drug offense." Before 1988, Section 841 did not include that phrase. Instead, each subsection of Section 841(b)(1) specifically described prior offenses that would trigger the sentencing enhancement and relied upon the classification of the offense under the law of the convicting jurisdiction. See, e.g., 21 U.S.C. 841(b)(1)(A) (1987) (enhanced penalties would apply "after one or more prior convictions * * * for a felony under any other * * * law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final"). In 1988, Congress amended the CSA to include the term "felony drug offense" in Section 841(b)(1)(A), and it defined the term in that section to require the convicting jurisdiction to classify the offense as a felony: "[T]he term 'felony drug offense' means an offense that is * * * a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressants or stimulant substances." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(1) and (2), 102 Stat. 4371. Finally, in 1994, Congress amended the statute to its current form, deleting the state-classification-based definition of "felony drug offense" in Section 841(b)(1)(A) and adding the

definition in Section 802(44), which focuses on the length of punishment associated with the prior conviction. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 90105, 108 Stat. 1987-1988.

Taken together, those changes support the conclusion that Congress intended to replace the prior definitions contained in Section 841(b)(1) with the definition in Section 802(44). See Roberson, 459 F.3d at 54 n.10. The court of appeals' decision correctly gives the specific, later-enacted statute controlling weight. See United States v. Estate of Romani, 523 U.S. 517, 532 (1998) (giving priority to the Tax Lien Act with respect to government claims of preference in insolvent taxpayer's estate as "the later statute [and] the more specific statute"); Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Further, Congress's decision to make the definition of "felony drug offense" independent of any given state's classification scheme makes sense "in the context of the evolving nature of the CSA," because as Congress "enact[ed] mandatory penalties," and then "increased the consequences of those mandatory penalties," it likely wished to "ensure that the mandatory recidivist penalty provisions would be applied uniformly not only across statutory lines, but across state lines." Roberson, 459

The court of appeals' holding that petitioner's prior offense was a "felony drug offense" is thus correct and does not warrant further review.

2. In United States v. West, 393 F.3d 1302 (2005), the D.C. Circuit came to the opposite conclusion, holding that the phrase "felony drug offense" incorporates the definitions contained in both Section 802(13) and Section 802(44). Id. at 1311-1315. The D.C. Circuit concluded that the presence of two definitions, for "felony" and "felony drug offense," rendered the statute ambiguous and triggered application of the rule of lenity. Id. at 1314-1315.

Unlike the First Circuit in Roberson, on which the court below relied, the D.C. Circuit did not consider the variety of ways in which the term "felony" is used throughout the entirety of the CSA; instead, it looked only to the sentence "enhancement provisions." West, 393 F.3d at 1314. See 21 U.S.C. 802 (providing that definitions therein apply to entire "subchapter" of the CSA, which is not limited to sentencing). The court failed to recognize that the term "felony" is used for a variety of purposes in the CSA, at times including more offenses and at times including fewer offenses than those described in Section 802(44). See, e.g., 21 U.S.C. 878(a)(3) ("felony" not limited to drug crimes); see also Roberson, 459 F.3d at 53-54 (collecting statutory provisions).

Review of petitioner's case is unwarranted, however, not only because the Fourth Circuit's decision is correct but also because

the conflict is extremely limited. This issue does not arise often, because the vast majority of States define offenses punishable by more than one year of imprisonment as felonies. See Gov't Br. at 26 n.20, Lopez v. Gonzales, 127 S. Ct. 625 (2006) (No. 05-547) (citing statutes). Further, in neither West, Roberson, nor petitioner's case did the parties seek rehearing en banc. Accordingly, the courts of appeals retain the ability to harmonize their decisions and eliminate the conflict. Finally, and in any event, the conflict is of very recent vintage, and this Court's review could benefit from additional consideration of the question by the lower courts. Review is thus unwarranted at this time.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

ELIZABETH A. OLSON
Attorney

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